STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED August 6, 2013
V	No. 312375 Bay Circuit Court
REBECCA JEAN SHIMEL, Defendant-Appellee.	LC No. 09-011150-FC

Before: SAWYER, P.J., and METER and DONOFRIO, JJ.

PER CURIAM.

The prosecutor appeals by leave granted[1] the trial court's order granting defendant's motion to withdraw her guilty plea on the basis that she received ineffective assistance of counsel. Because the trial court clearly erred by determining that trial counsel failed to investigate a battered spouse self-defense theory of defense, the court impermissibly substituted its judgment for that of trial counsel on a matter of strategy, the court failed to apply the "prejudice" prong of the test for determining whether defendant received ineffective assistance of counsel, and the court erroneously determined that defendant's guilty plea was not knowingly and voluntarily made on the basis that she received ineffective assistance of counsel, we reverse and remand for further proceedings.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Defendant was charged with open murder, MCL 750.316, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, in the shooting death of her husband, Rodney Shimel. Defendant fired seven shots, reloaded the gun, and continued to fire. Shimel sustained nine gunshot wounds, seven of which entered his body through his back. Defendant was arrested on the same day that the shooting occurred.

Defendant was represented by four different attorneys, two court-appointed and two retained, before she entered her guilty plea. The court-appointed attorneys represented defendant

[1] *People v Shimel*, unpublished order of the Court of Appeals, issued January 14, 2013 (Docket No. 312375).

only briefly. Before defendant's preliminary examination, while she was represented by her first retained attorney, the assistant prosecutor, J. Dee Brooks, offered to allow defendant to plead guilty to second-degree murder and felony-firearm with no sentence recommendation in exchange for the dismissal of the open murder charge. The offer remained open until the day before the preliminary examination. Although defendant decided to accept the plea offer, Brooks withdrew it because defendant's attorney did not inform him that defendant wanted to accept it until the morning of the preliminary examination. Thus, because the plea offer was not accepted before Brooks's deadline, the offer was withdrawn. Following the preliminary examination, defendant was bound over for trial.

Thereafter, the trial court granted defense counsel's motion to withdraw, and defendant retained attorney E. Brady Denton to represent her. On October 5, 2010, the trial court entered a stipulation to adjourn trial that indicated that Denton was investigating a "battered spouse" defense and intended to hire an expert to interview defendant. Denton spoke several times with attorney Dale Grayson at the National Clearinghouse for the Defense of Battered Women. Grayson sent Denton a packet of materials regarding the defense, including articles, appellate decisions in cases involving the defense, and information regarding courts' positions on the defense. According to Denton, he discussed the possibility of a battered spouse defense with defendant and her family and friends as well as the prosecutor. Ultimately, he decided not to pursue a battered spouse defense and did not hire an expert.

Over the next few months, Denton and Brooks had several discussions regarding a possible guilty plea. Brooks refused to consider a plea to manslaughter and refused Denton's request for a second-degree murder plea with a sentence cap. In January 2011, Brooks offered defendant the same plea that he had previously offered, i.e., second-degree murder and felony-firearm with no sentence recommendation in exchange for dropping the open murder charge. Defendant accepted the plea and pleaded guilty on February 3, 2011. The trial court sentenced defendant to 18 to 36 years in prison for the murder conviction, to be served consecutive to 2 years' imprisonment for the felony-firearm conviction.

On September 21, 2011, defendant filed a motion to withdraw her plea, to correct her invalid sentence, and to amend the presentence investigation report. In her motion to withdraw her plea, defendant argued that Denton had rendered ineffective assistance of counsel for failing to investigate a battered spouse syndrome defense and/or hire an expert to examine defendant. Defendant asserted that her plea was therefore involuntary. She requested the appointment of a battered spouse syndrome expert at public expense as well as a *Ginther*[2] hearing.

At the *Ginther* hearing, Denton admitted that he signed the stipulation to adjourn trial in part to investigate a battered spouse syndrome defense. He obtained the packet of materials from Grayson regarding the defense, talked to defendant, and reviewed the police reports. He asserted that he originally intended to hire an expert witness regarding the defense, but ultimately determined after reviewing the case materials that the defense was not worth pursuing. One of Denton's biggest concerns was the fact that defendant reloaded her gun and continued shooting.

[2] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

Also, there was not much evidentiary support to show a history of physical abuse against defendant. There was only one documented incident of domestic violence. When asked whether he thought that self-defense or a battered spouse defense was a viable defense, Denton responded, "I don't think it could be sold to a jury."

Denton testified that he met with defendant while she was incarcerated at least two or three times and probably wrote letters to her during the seven months that he represented her. Denton scored defendant's sentencing guidelines before the plea hearing but he did not tell defendant the sentence that she was likely to receive. Denton admitted that he told Grayson in a letter dated March 10, 2011, that defendant could receive "as little as 8 years, although [he] would expect 10 to 11 years" based on his calculation of the sentencing guidelines. Denton told defendant that her sentence would be controlled by the sentencing guidelines. Denton testified that one of his concerns was defendant's desire to be with her children. Defendant had told Denton that she wanted an opportunity to get out of prison and be with her children someday. Denton testified that considering defendant's desire to be with her children and his belief that a battered spouse defense would not be successful, he thought the second-degree murder plea was a good option because it would give defendant a chance to be released from prison one day.

Dr. Karla Fischer testified as an expert witness on domestic violence and battered spouse syndrome. She maintained that battered spouse syndrome is "not a defense per se, but the expert testimony helps to support a theory of self-defense." She opined that a battered spouse defense presented to a jury typically results in a reduction of charges, most commonly a reduction from first-degree murder to second-degree murder.

Fischer conducted a domestic violence evaluation of defendant in prison in October 2011 after defendant moved to withdraw her plea. Defendant told Fischer that Shimel had abused her physically and emotionally throughout their 30-year marriage and had threatened to kill her. Defendant claimed that Shimel had punched her, strangled her, kicked her, restrained her, and committed acts of sexual violence against her. Defendant admitting stabbing Shimel with a knife while he was choking her early in their relationship. Fischer opined that, based solely on the information that defendant provided, defendant had acted in self-defense. Fischer admitted that she did not have a "full grasp" of the forensic evidence and that a battered spouse assessment is based on a defendant's perception of events, which might not match up with other facts. Defendant told Fischer that she was having financial difficulties at the time of the shooting, but Fischer did not believe that that information was important. When asked whether it would have had any significance if defendant had a gambling problem and defendant and Shimel had conflict about it, Fischer responded:

> *A.* Well, my job in understanding the history of domestic violence doesn't necessarily in – that wouldn't necessarily be psychologically significant in the evaluation of domestic violence and its effects. So, I guess the answer would be no, it wouldn't necessarily be important.
>
> *Q.* So you wouldn't consider other motivation for the shooting?
>
> *A.* I'm not really sure how to answer that question. I mean, my job is not to understand the motivation underlying the shooting. My job is to understand the

> history of . . . domestic violence, how it affected her and whether or not it led her to act in self-defense.

Defendant testified that she never received any phone calls or correspondence from Denton while she was in jail. She claimed that Denton visited her twice, the first time for "under an hour and the second time lasted for about 10, 15 minutes." According to defendant, Denton told her at the second meeting that he was going to speak to Brooks and try to negotiate a plea deal with a sentence of 7 to 15 years or less. Defendant maintained that Denton did not explain the sentencing guidelines to her, nor did he ask if she had any prior convictions. Defendant testified that the next time that she saw Denton was when she walked into the courtroom for the plea hearing. After defendant pleaded guilty, she wrote a letter to Denton that stated:

> I'm writing you to—I'm writing to in regards to—to the plea hearing that occurred today at 1:30. What happened? Why was I not notified by you or your office or by Mr. Jacob Kolinski, your legal assistant who was with you today? Why didn't I get to meet or speak with you before the court—before court so you could explain what this plea deal you had was all about? How could you do this to me? What did I just plea to? How much time am I looking at? What is the difference of Open Murder and Second Degree Murder? I'm extremely confused, distraught, and frankly, I don't remember much about what happened today in court.

Defendant admitted that it was a priority for her to be able to be released from prison one day so that she could be with her children. Defendant also admitted that she told a different story about the shooting when she first spoke to a detective and persons at the forensic center. She initially did not tell the detective that she thought that Shimel was going to kill her that day. Later, defendant claimed that she did not tell the detective that she thought that Shimel was going to kill her because she wanted to protect her family from the media. Defendant admitted that she was an avid gambler and had financial problems. She "possibly" bounced two checks on the day of the shooting, and she "might have told" a friend that she could not support herself financially without Shimel. Defendant also admitted that she talked to her daughters on the phone from jail and tried to get them to remember the abuse that Shimel allegedly inflicted on her. Defendant testified that her daughters "probably" told her that they did not recall any abuse. Defendant also acknowledged that her daughters testified at the preliminary examination that they did not recall any physical abuse.[3]

Grace Ombry, defendant's best friend in high school, testified that defendant began dating Shimel after she dropped out of high school in the beginning of her senior year in 1981. Defendant and Shimel moved into an apartment together in 1983 before they married. Ombry visited the apartment once, during which time defendant showed Ombry bruises on her leg and claimed that Shimel had beaten her. She also showed Ombry a gun that Shimel owned and said that Shimel had threatened her with it. Later in 1983, shortly after defendant and Shimel

[3] It is unclear how old defendant's daughters were at that time, but they were younger than defendant's oldest son, who was 24, and older than her youngest son, who was 12.

married, defendant told Ombry that she was unhappy and wanted to get a divorce because Shimel was mean to her. Ombry had not had regular contact with defendant since they were teenagers.

Brooks testified that from the beginning of the case, he believed that defendant had only two possible defenses—insanity and self-defense under a battered spouse theory. Brooks viewed defendant's videotaped statements to the police in which she admitted that she shot Shimel several times during an argument in their bedroom while three of their children were home. No other weapons were involved to suggest that defendant was in any danger. Brooks testified that in his early conversations with Denton, Denton mentioned that he was considering a self-defense defense under a battered spouse theory, but Brooks did not believe that the evidence supported such a defense. Brooks maintained that the police had spoken to "dozens and dozens" of people, and Brooks did not believe that there was any substantiating proof of any serious prior violent acts between defendant and Shimel. In fact, Brooks testified that all four of defendant's children "denied that they had ever seen any physical violence or threats of physical violence" between their parents. Brooks told Denton that, in his view, the shooting was precipitated by the couple's financial problems, and specifically defendant's gambling problem. Shimel was working extra jobs on the side to earn money for the family during the holidays, and funds were missing, including a recent payment for a job in the form of a check. Brooks learned from family members and a friend that Shimel was considering leaving the home and either divorcing or separating from defendant. According to Brooks, the physical evidence was also inconsistent with self-defense. Shimel suffered seven gunshot wounds to his back, two of which were fatal and would have disabled Shimel very quickly. Although the chamber of the gun held only seven bullets, Shimel suffered nine gunshot wounds. The theory that defendant reloaded the gun and then continued to shoot was consistent with the children's description of what they had heard from downstairs. Brooks reviewed Fischer's report and testified "with absolute certainty" that it would not have convinced him to change the plea offer or his assessment of the strengths and weaknesses of his case. Brooks viewed Fischer's report as contradictory and self serving.

The trial court granted defendant's motion to withdraw her plea. With respect to counsel's performance and the first prong of the *Strickland*[4] test, the court stated:

> [C]ertain things, listening to the testimony, strike me. One is that Mr. Denton spent, from the record, probably no more than 1.5 hours maximum time speaking to his client on a capital felony life offense without parole should she be convicted as charged. Presumably it was an open murder, but let's assume it was a murder one that she was convicted of. As no doubt the prosecution would argue.
>
> Mr. Denton spent approximately maximum of 1.5 hours time with the defendant before negotiating a plea that ultimately was taken.

[4] *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

In my opinion, and I also find, that Mr. Denton did not meet with the defendant in – in jail or even in lockup prior to coming into the courtroom and having his client accept the plea after it was negotiated with Mr. Brooks.

I believe the defendant when she indicates that the first time she saw Mr. Denton the day of the plea was when she walked into the courtroom here.

I find it somewhat incredible that the lawyer would not go over the plea even the day of the plea one last time and say, do you really want to do this? Do you understand what's going on? Not sitting at counsel table as does counsel right now for [defendant.]

I find that he didn't do an investigation into what he could characterize as a duress defense, but probably more of a self-defense aspect of the case. Even asking for an adjournment and an opportunity to do so, representing to the Court that he wanted to look into that defense. And when he – I think he failed to thoroughly investigate the self-defense aspect of the case.

He failed to inform her of what she was even in court for on the day she took the plea, to talk to her one last time as I already said. I find that that's the case. I believe her.

And that he failed to discuss, also, the likely sentence or disclose the likely sentence based upon an adequate analysis of the guidelines. And that's reflected by that – the – the – some of the exhibits that are here, and frankly, by the testimony.

There was no independent investigation of the self-defense aspect of the case. . . . In my opinion, he's testified that he primarily relied upon the prosecutorial representations as to the strength of their case without doing any independent investigation that I've heard of.

So, in my opinion, the first test of *Strickland* is met. I'm sorry. The test of *Strickland* is met. It's the test of *Strickland-Hill* then comes into play.

The trial court then addressed the second prong of the test, regarding prejudice resulting from counsel's deficient performance. In its ruling, the court declined to address the issue of prejudice under *Strickland* and *Hill v Lockhart*, 474 US 52; 106 S Ct 366; 88 L Ed 2d 203 (1985). The court stated:

THE COURT: The second prong, the *Hill* part of it requires that the defendant allege that but for his attorney's deficient performance, "she" in this case, would've gone to trial rather than pled guilty.

Well, of course, by the very nature of these motions that's what she's asserting here. That remains to be seen, her prerogative later on whether or not to make – do that or not.

Very difficult for me in light of some of the standards, as [the prosecutor] indicates here on the record, that I'm supposed to make some sort of educated guess rather was [sic] to likelihood of success, and I don't think – I think I can decline to do that.

One can certainly strongly argue that maybe a – a defense lawyer can convince a jury that it was either justifiable or perhaps voluntary manslaughter which would greatly reduce her sentence from what it presently is.

On the other hand, a jury could easily convict of first degree and/or second degree.

I want – on a personal note and I alluded to this with [the prosecutor], the transcript doesn't reflect the atmosphere that existed in this courtroom that I personally observed. A transcript is a black and white summary of what was said, basically and – not summary, but verbatim, what was said by me and what was said by her.

And I will indicate this. I – I know I thoroughly covered the aspects of the plea in this case. And there's a reason I did it. And the reason is, is I wasn't sure if she knew what was going on. I wasn't positive of it. And at the time, I assumed that she was fully aware of what the likely sentence would be. At least the sentencing guideline range.

Of course, I would have the prerogative to sentence her simply to life without a guidelines range as well. But I recall without even reading the transcript one of the things she said to me was that "I just wanted him to stop" or words to that effect. That's my recollection, and again, I didn't review – actually I didn't review the plea taking transcript for today. And prior to the *Ginther* hearing, I – I don't recall reviewing the transcript either then. But I remember her saying, vividly, "I just wanted him to stop." And that's when I went into, I think, and again, I didn't review it for today's purposes, but the self-defense and waiving defenses and the like.

And I did that because I was very cautious in that I really wanted to make sure she knew what she was doing by pleading guilty in light of a potential defense that she had.

And perhaps that will come back to haunt her, as [the prosecutor] suggests it should. But from a personal standpoint, I think she was confused.

And I did not know until the – after the fact, that Mr. Denton had not spoken to her that morning or afternoon prior to the plea taking process other than on the record here, that she met him for the first time in the courtroom. She testified to that, as I recall. And I believe her on that.

I tried my best to determine that she understood what was going on, the gravity of her plea and the likely course of action that I would take. I did find her

> plea was voluntarily (sic). But again, that plea – voluntariness was not found, ah, because I was aware [sic] that counsel hadn't informed her of these various and sundry things. And having heard that now on this post-sentence proceeding, I have to also find that in my opinion that based upon her ineffective assistance of counsel, that her plea was not knowingly and voluntarily made.

Accordingly, the trial court granted defendant's motion to withdraw her guilty plea.

II. STANDARDS OF REVIEW

We review for an abuse of discretion a trial court's decision granting a defendant's motion to withdraw a guilty plea. *People v Brown*, 492 Mich 684, 688; 822 NW2d 208 (2012). "A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes." *People v Waterstone*, 296 Mich App 121, 131-132; 818 NW2d 432 (2012). "A trial court necessarily abuses its discretion when it makes an error of law." *Id*. at 132. "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We review a trial court's findings on questions of fact for clear error, and review questions of constitutional law de novo. *Id*.

III. LEGAL ANALYSIS

"A defendant pleading guilty must enter an understanding, voluntary, and accurate plea." *Brown*, 492 Mich at 688-689. "The longstanding test for determining the validity of a guilty plea is whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." *Hill*, 474 US at 56 (quotation marks and citation omitted). "Where . . . a defendant is represented by counsel during the plea process and enters his plea upon the advice of counsel, the voluntariness of the plea depends on whether counsel's advice was within the range of competence demanded of attorneys in criminal cases." *Id*. (quotation marks and citation omitted). In *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984), the United States Supreme Court articulated a two-part standard for determining whether a defendant was denied the effective assistance of counsel: (1) "the defendant must show that counsel's representation fell below an objective standard of reasonableness," *id*. at 688, and (2) "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *id*. at 694. In *Hill*, 474 US at 57, the Court held that the same two-part test "applies to challenges to guilty pleas based on ineffective assistance of counsel." The Court stated:

> In the context of guilty pleas, the first half of the *Strickland v. Washington* test is nothing more than a restatement of the standard of attorney competence . . . . The second, or "prejudice," requirement, on the other hand, focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process. In other words, in order to satisfy the "prejudice" requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.

> In many guilty plea cases, the "prejudice" inquiry will closely resemble the inquiry engaged in by courts reviewing ineffective-assistance challenges to convictions obtained through a trial. For example, where the alleged error of counsel is a failure to investigate or discover potentially exculpatory evidence, the determination whether the error "prejudiced" the defendant by causing him to plead guilty rather than go to trial will depend on the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea. This assessment, in turn, will depend in large part on a prediction whether the evidence likely would have changed the outcome of a trial. Similarly, where the alleged error of counsel is a failure to advise the defendant of a potential affirmative defense to the crime charged, the resolution of the "prejudice" inquiry will depend largely on whether the affirmative defense likely would have succeeded at trial. [*Id.* at 58-59.]

A. BATTERED SPOUSE SYNDROME DEFENSE

The prosecution argues that the trial court erred by finding that Denton failed to adequately investigate a battered spouse syndrome defense. The trial court stated:

> I find that he [i.e., Denton] didn't do an investigation into what he could characterize as a duress defense, but probably more of a self-defense aspect of the case. Even asking for an adjournment and an opportunity to do so, representing to the Court that he wanted to look into that defense. And when he – I think he failed to thoroughly investigate the self-defense aspect of the case.
>
> * * *
>
> There was no independent investigation of the self-defense aspect of the case. . . . In my opinion, he's testified that he primarily relied upon the prosecutorial representations as to the strength of their case without doing any independent investigation that I've heard of.

As discussed below, the trial court clearly erred by determining that Denton failed to conduct an investigation regarding a battered spouse self-defense theory and improperly substituted its judgment for that of trial counsel on a matter of trial strategy.

"Trial counsel is responsible for preparing, investigating, and presenting all substantial defenses." *People v Chapo*, 283 Mich App 360, 371; 770 NW2d 68 (2009). A substantial defense is a defense that might have made a difference in the outcome of the case. *Id.* The failure to reasonably investigate a possible defense can constitute ineffective assistance of counsel. *People v McGhee*, 268 Mich App 600, 626; 709 NW2d 595 (2005).

In this case, the trial court found that Denton failed to fully and independently investigate a self-defense defense based on a battered spouse theory, thus satisfying the first prong of the *Strickland* test. The trial court's finding was clearly erroneous. The *Ginther* hearing testimony established that Denton is an experienced attorney, he was the elected county prosecutor for Saginaw County for four years beginning in 1972, and he had handled approximately two hundred homicide cases. Denton testified that he had spoken on several occasions with Dale

Grayson at the National Clearinghouse for the Defense of Battered Women regarding the battered spouse syndrome defense and had obtained materials from Grayson regarding the defense. Denton was concerned about the fact that defendant fired several shots into Shimel's back, reloaded the gun, and continued to fire. He was also concerned that none of her four children had witnessed any physical abuse or threat of physical abuse to defendant, and there was very little evidentiary support to substantiate a history of physical abuse. Denton explained that he decided not to pursue the defense because he did not believe that "it could be sold to a jury." In fact, he testified that he believed that defendant would have been convicted of first-degree murder had she proceeded to trial. Because defendant's primary goal was to one day be released from prison in order to be with her children, Denton believed that a plea to second-degree murder was her best option. Thus, the record shows that the trial court clearly erred by determining that Denton failed to conduct an investigation into a battered spouse theory of self-defense. Moreover, the trial court's findings indicate that it impermissibly substituted its judgment for that of Denton regarding matters of strategy. See *People v Unger*, 278 Mich App 210, 242-243; 749 NW2d 272 (2008) ("We will not substitute our judgment for that of counsel on matters of trial strategy, nor will we use the benefit of hindsight when assessing counsel's competence.")

Further, the trial court erred by failing to apply the prejudice prong of the *Strickland-Hill* test. The parties dispute the nature and extent of the prejudice requirement. Defendant argues that all that the prejudice prong of the *Strickland-Hill* test requires "is that the defendant allege that but for her attorney's deficient performance, she would have gone to trial rather than plead guilty." On the other hand, the prosecution argues that a defendant must also show, and the court must find, that the defense that defense counsel failed to investigate "would have changed the outcome at trial." As previously discussed, the United States Supreme Court held in *Hill*, 474 US at 59, that "in order to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." The Court explained that the "prejudice" inquiry in guilty plea cases

> where the alleged error of counsel is a failure to investigate or discover potentially exculpatory evidence . . . will depend on the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea. This assessment, in turn, will depend in large part on a prediction whether the evidence likely would have changed the outcome of a trial. Similarly, where the alleged error of counsel is a failure to advise the defendant of a potential affirmative defense to the crime charged, the resolution of the "prejudice" inquiry will depend largely on whether the affirmative defense likely would have succeeded at trial. See, *e.g., Evans v. Meyer,* 742 F2d 371, 375 (CA7 1984) ("It is inconceivable to us . . . that [the defendant] would have gone to trial on a defense of intoxication, or that if he had done so he either would have been acquitted or, if convicted, would nevertheless have been given a shorter sentence than he actually received"). As we explained in *Strickland v. Washington, supra,* these predictions of the outcome at a possible trial, where necessary, should be made objectively, without regard for the "idiosyncrasies of the particular decisionmaker." *Id.,* 466 U.S., at 695. [*Hill*, 474 US at 59-60 (brackets in original).]

Thus, contrary to defendant's argument, she had to do more than merely allege that she would have gone to trial instead of pleading guilty but for her attorney's alleged deficient performance. Rather, she was required to show that the defense would have been successful if she had gone to trial in that she would have received a better outcome than she received after pleading guilty.

The record shows that the trial court declined to apply the second prong of the *Strickland-Hill* test and refused to speculate about the success of a self-defense defense if defendant had proceeded to trial. The trial court stated:

> Very difficult for me in light of some of the standards, as [the prosecutor] indicates here on the record, that I'm supposed to make some sort of educated guess rather was [sic] to likelihood of success, and I don't think – I think I can decline to do that.

The trial court's comments were consistent with its previously-expressed views regarding the second prong of the *Strickland-Hill* test. During a discussion with the prosecutor, the trial court stated:

> *[THE PROSECUTOR]:* In terms of applying the second prong in cases where there's a plea, this requires a showing that but for the attorney's errors, defendant would not have pled guilty and instead would have insisted on going to trial.
>
> However, this requirement is not satisfied simply by defendant's claim that she would have insisted on going to trial. Rather, this requirement requires an evaluation of whether the evidence would have caused counsel to change his recommendation regarding the plea and whether the evidence would have changed the outcome at trial.
>
> *THE COURT:* Well, that would cause me to – I have some difficulty with that kind of standard 'cause I then have to make a best guess whether the person is guilty or not based upon what I have – what little I have in front of me.
>
> I – I have some real trouble with that. I understand it's there and you're quoting it correctly, but – so I have to guess whether a jury might convict this person of whatever they might convict this person of or any other person matter (sic) – that this kind of issue would come before me.
>
> I – I do have some difficulty with that portion of this. I know it's there and you're quoting it. So, I just want to put that on the record though.

Accordingly, the record shows that the trial court was aware of the correct standard to apply and acknowledged that the prosecutor was quoting the test correctly, but nevertheless declined to apply it. Thus, the trial court legally erred by failing to apply the prejudice prong of the *Strickland-Hill* test. "A trial court necessarily abuses its discretion when it makes an error of law." *Waterstone,* 296 Mich App at 132.

Moreover, the record establishes that defendant would not have received a better outcome if she had gone to trial and argued that she acted in self-defense based on a battered spouse theory. Other than defendant's claims of abuse, the only testimony showing that Shimel was physically abusive toward defendant was Ombry's testimony that in 1983 defendant showed Ombry bruises on her leg and told Ombry that Shimel had threatened her with a gun. None of defendant's friends or family members corroborated defendant's claims of physical abuse, even after defendant tried to get her daughters to recall the alleged abuse when defendant talked to them on the telephone from jail. Defendant's children told the police that what they heard while downstairs in the home was consistent with defendant shooting, stopping to reload the gun, and continuing to fire. In addition, seven of the bullets entered Shimel's body through his back. Thus, the evidence simply did not support a self-defense theory. Moreover, Fischer testified that in cases involving a battered spouse defense, charges are typically reduced from first-degree murder to second-degree murder, which is exactly what occurred in this case as a result of defendant's plea. Accordingly, the record does not show that defendant would have received a better outcome had she gone to trial instead of pleading guilty. As such, defendant has failed to establish the prejudice prong of the *Strickland-Hill* test.

B. VOLUNTARINESS OF DEFENDANT'S PLEA

The trial court also determined that Denton's performance fell below an objective standard of reasonableness because he spent only 1-½ hours speaking to defendant during his representation of her, Denton did not discuss the sentencing guidelines or defendant's likely sentence with her, and he failed to speak with her on the day that she entered her guilty plea in order to review the plea with her a final time. The trial court opined that, based on Denton's deficient performance, defendant's guilty plea was not knowingly and voluntarily made.

We again conclude that defendant has failed to establish prejudice. Defendant did not testify, and was not asked, whether she would have rejected the prosecution's plea offer and proceeded to trial but for Denton's lack of communication with her. It appears unlikely that she would have done so given that she chose to accept the same plea offer before her preliminary examination, but the offer was withdrawn because defendant's attorney at that time did not timely communicate defendant's acceptance of the offer to the prosecution. In addition, the plea hearing transcript establishes that defendant understood the consequences of her plea, including that she was not promised any particular sentence. At the plea hearing, the trial court questioned defendant as follows:

> *THE COURT:* Gi—Your [sic] full name for the record, please, ma'am?
>
> *THE DEFENDANT:* Rebecca Jean Shimel.
>
> *THE COURT:* And do you understand the charges that are levied against you in the Information as amended?
>
> *THE DEFENDANT:* Yes.
>
> *THE COURT:* Okay. And do you understand the plea agreement?
>
> *THE DEFENDANT:* Sorta.

THE COURT: What don't you understand about the plea agreement?

MR. DENTON: You know that Counts 1 and Counts 2 are going to be dismissed in—in exchange for a plea to Count 3 and Count 4.

THE DEFENDANT: Right. I—I'm just not aware of what the plea agreement—how many years it consists of.

THE COURT: You mean the sentence?

THE DEFENDANT: Correct.

THE COURT: Well, I—I would determine that at the time of sentencing. I don't know what it's going to be either, ma'am.

MR. DENTON: I've explained to her that there are such things as guidelines and that your Honor is virtually bound to stay within the guidelines.

THE COURT: Yeah. There are such things as guidelines. Mr. Denton is correct. And I don't have an idea of what those guidelines are at this time.

Those are not prepared until approximately the time of sentencing—before sentencing. But I don't know what they are right now. Maybe—Maybe Mr. Brooks and maybe Mr. Denton have an idea, but as far as I'm—as far as I know, I don't know what they are right now, ma'am. Okay?

THE DEFENDANT: (No response)

THE COURT: Understand that, ma'am?

THE DEFENDANT: Yes.

THE COURT: And I can't predict what my sentence will be in this case. I—I don't—I simply don't know. Understand that, ma'am?

THE DEFENDANT: Yes.

THE COURT: Okay. Do you want to proceed?

THE DEFENDANT: Yes.

THE COURT: All right. So, you understand the plea agreement then? You're pleading guilty to—the essence of it is you're pleading guilty to Counts 3 and 4 which are, respectively, Second Degree Murder and Felony Firearm, in exchange for dismissal of Count 1, Open Murder, and Count 2, Felony Firearm.

Do you understand that, ma'am?

THE DEFENDANT: Yes.

THE COURT: All right. Any other questions about just the plea agreement?

THE DEFENDANT: May I take it back if I choose to?

THE COURT: I'm sorry?

THE DEFENDANT: May I take it back if I choose to?

THE COURT: Generally—I will indicate to you, the—the law gives me the authority to allow you to withdraw your plea. But as a general proposition, un—if you're making your pre—plea freely and willingly today and with full knowledge of what's going on, I generally wouldn't allow a person to withdraw their plea.

You have a right to go to a trial, ma'am. I'm gonna tell you that in a couple of minutes anyway, so if you'd rather go to trial, that's up to you.

But I can't tell you on this record today that if you decided to change your mind that I would allow you to withdraw your plea.

THE DEFENDANT: Okay.

THE COURT: Okay what? You want to go to trial?

THE DEFENDANT: No. I understand.

THE COURT: Okay. You want to go—You want to go ahead with the plea, is that right?

THE DEFENDANT: Correct.

THE COURT: I'm sorry?

THE DEFENDANT: Correct.

Thereafter, defendant indicated that she was pleading guilty voluntarily and of her own free will and that she understood that nobody was recommending a particular sentence and that the court was not aware of what defendant's sentencing guidelines might be. Defendant also indicated that she understood that she could be sentenced to life or any term of years on the murder count. With respect to the defense of self-defense, the trial court inquired as follows:

THE COURT: All right. Now, as –Mr. Denton, I'm sure, has indicated to you that there is a possibility of a defense of self-defense or justifiable homicide, perhaps is another way of saying it, I don't know. But self-defense would be one way of saying it. There may be other ways of saying the same thing, that you had some sort of justification for doing this.

> But by pleading guilty here, you're waiving any such defense, if indeed it would be a valid defense. I can't say whether it would be or not, of course. A jury would make that decision. Not me—Well, it's a jury trial, so I wouldn't make the decision, but a jury would make that decision whether or not it's justifiable.
>
> By pleading guilty, ma'am, you would be waiving that defense, if it indeed exists. In other words, if it's a valid defense. I can't say, of course, one way or the other without knowing lots more, if—if indeed I could say at all because that's up to the jury.
>
> So, are you willing to waive that defense, if indeed it is a defense for you?
>
> *THE DEFENDANT:* Yes.
>
> *THE COURT:* I'm sorry?
>
> *THE DEFENDANT:* Yes.

Thus, defendant agreed to forego any claim of self-defense and plead guilty.

The record shows that the trial court complied with the procedures set forth in MCR 6.302[5] and determined that defendant's plea was knowingly and voluntarily made. In fact, in accepting the plea, the court stated:

> I do find the defendant understands the nature of the charge, is acting voluntarily with understanding here this afternoon and that no one has forced her or coerced her to do this, that she understands the things I have explained here on the record which would include her trial rights, the consequences of her plea, the maximum sentence available to the Court under the law, the—if I haven't said it,

[5] MCR 6.302(B) and (C) are designed to allow a court to determine whether the plea is understanding and voluntary:

> Under MCR 6.302(B), which relates to an understanding plea, the court must speak directly to the defendant and determine that he or she understands the name of the offense and the maximum possible prison sentence, the trial rights being waived, and loss of the right to appeal. Pursuant to MCR 6.302(C), which relates to a voluntary plea, the court must make inquiries regarding the existence and details of any plea agreements and whether the defendant was promised anything beyond what was in the agreement, if any, or otherwise. The court must also ask the defendant whether he or she had been threatened and if the plea was his or her choice. [*People v Plumaj*, 284 Mich App 645, 648 n 2; 773 NW2d 763 (2009).]

> the trial rights, and frankly, all the consequences of her plea and the things that have gone on here this afternoon, I think she understands.

Therefore, the trial court determined that defendant's plea was knowingly and voluntarily made at the time that defendant rendered the plea. Because the trial court's decision to allow defendant to withdraw her plea was based on its erroneous determination that defendant was denied the effective assistance of counsel, the trial court abused its discretion by allowing defendant to withdraw her plea. We thus reverse the trial court's order granting defendant's motion to withdraw the plea and remand this case for the court to address defendant's motions to correct her sentence and to amend the presentence investigation report, which were rendered moot when the court allowed defendant to withdraw her plea.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Patrick M. Meter
/s/ Pat M. Donofrio